



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R8-ES-2013-0042; 4500030113]

RIN 1018-AZ70

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Bi-State Distinct Population Segment of Greater Sage-Grouse

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; extension of comment period.

SUMMARY: On April 8, 2014, we, the U.S. Fish and Wildlife Service (Service), announced a reopening of the public comment period on the October 28, 2013, proposal to list the Bi-State distinct population segment (DPS) of greater sage-grouse (Bi-State DPS; *Centrocercus urophasianus*) as threatened under the Endangered Species Act of 1973, as amended, with a special rule, and the proposed designation of critical habitat.

This document announces an extension of the comment period on the proposed critical habitat rule. We also announce the availability of a draft economic analysis (DEA) of the proposed designation of critical habitat for the Bi-State DPS and an amended required determinations section of the proposal. We are extending the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed critical habitat rule, the associated DEA, and the amended required determinations section.

Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final critical habitat rule. The comment period on the associated proposed listing rule is not being extended and closes on June 9, 2014.

DATES: For the proposed rule published on October 28, 2013 (78 FR 64328), the comment period is extended. In order to fully consider and incorporate public comment, the Service requests submittal of comments by close of business [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION]. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date.

ADDRESSES:

Document availability: You may obtain copies of the proposed rule and the draft economic analysis (IEc 2014) on the internet at <http://www.regulations.gov> at Docket No. FWS–R8–ES–2013–0042 or by mail from the Nevada Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Written Comments: You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. Submit comments on the critical habitat proposal and associated draft economic analysis by searching for FWS–R8–ES–2013–0042, which is the docket number for this rulemaking.

(2) *By hard copy:* Submit comments on the critical habitat proposal and associated draft economic analysis by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R8–ES–2013–0042; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments **only** by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **Information Requested** section below for more information).

FOR FURTHER INFORMATION CONTACT: Edward D. Koch, State Supervisor, U.S. Fish and Wildlife Service, Nevada Fish and Wildlife Office, 1340 Financial Boulevard, Suite 234, Reno, NV 89502; telephone 775–861–6300; or facsimile 775–861–6301. Persons who use a telecommunications device for the deaf (TDD) may call the

Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Information Requested

We will accept written comments and information during this comment period on our proposed designation of critical habitat for the Bi-State DPS that was published in the **Federal Register** on October 28, 2013 (78 FR 64328), our DEA of the proposed designation (IEc 2014), and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as “critical habitat” under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the Bi-State DPS from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

(a) The amount and distribution of the Bi-State DPS's habitat;

(b) What specific areas, within the geographical area currently occupied (at the time of listing) that contain the features essential to the conservation of the DPS, should

be included in the designation and why;

(c) The features essential to the conservation of the Bi-State DPS as described in the *Physical or Biological Features* section of the proposed rule, in particular the currently unsuitable or less than suitable habitat that accommodates restoration identified in the Bi-State Action Plan (i.e., actions HIR1-1-PN, HIR-1-2-PN, HIR1-1-DCF, HIR1-2-DCF, HIR1-1-MG, HIR1-1-B, and HIR1-3-SM) (Bi-State Technical Advisory Committee (TAC) 2012, pp. 93-95).

(d) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(e) What areas not within the geographical area currently occupied (at the time of listing) are essential for the conservation of the DPS and why.

(3) Whether there is scientific information in addition to that considered in our proposed rule that may be useful in our analysis.

(4) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(5) Data specific to document the need for addition or removal of areas identified as proposed critical habitat.

(6) Data specific to recreational use in the Bi-State area and potential adverse or beneficial effects caused by such use within proposed critical habitat.

(7) Spatial data depicting meadow/brood-rearing habitat extent and condition.

(8) Information on the projected and reasonably likely impacts of climate change

on the Bi-State DPS and proposed critical habitat.

(9) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular, the benefits of including or excluding areas that exhibit these impacts.

(10) Information on the extent to which the description of economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts.

(11) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the DEA, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

(12) Whether any areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(13) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

If you submitted comments or information on the proposed critical habitat rule (78 FR 64328; 78 FR 77087) during the initial comment period from October 28, 2013, to February 10, 2014, or earlier during this current open comment period, please do not resubmit them. Any such comments are part of the public record of this rulemaking

proceeding, and we will fully consider them in the preparation of our final determination. Our final determination concerning critical habitat will take into consideration all written comments and any additional information we receive during both comment periods. The final decision may differ from this revised proposed rule, based on our review of all information received during this rulemaking process.

You may submit your comments and materials concerning the proposed critical habitat rule or DEA by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the website. We will post all hardcopy comments on <http://www.regulations.gov> as well. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule and DEA, will be available for public inspection on <http://www.regulations.gov> at Docket No. FWS-R8-ES-2013-0042, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Nevada Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain

copies of the proposed rule and the DEA on the Internet at <http://www.regulations.gov> at Docket No. FWS-R8-ES-2013-0042, or by mail from the Nevada Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

On October 28, 2013, we published a proposed rule to list the Bi-State DPS as a threatened species under the Endangered Species Act of 1973, as amended (Act) (78 FR 64358), with a special rule. We concurrently published a proposed rule to designate critical habitat (78 FR 64328). We received requests to extend the public comment periods on the rules beyond the December 27, 2013, due date. In order to ensure that the public had an adequate opportunity to review and comment on our proposed rules, we extended the comment periods for an additional 45 days to February 10, 2014 (78 FR 77087).

On April 8, 2014, we reopened the comment period on our October 28, 2013, proposed rule to list the Bi-State DPS, the special rule, and the proposed critical habitat rule (79 FR 19314, April 8, 2014). We also announced two public hearings: (1) April 29, 2014, in Mindon, Nevada; and (2) April 30, 2014, in Bishop, California. These meetings were subsequently cancelled for unrelated reasons. On May 9, 2014, we published a document announcing the re-scheduled hearings to take place on May 28, 2014, and May 29, 2014, respectively (79 FR 26684, May 9, 2014). The April 8, 2014,

document also announced a 6-month extension of the final determination of whether or not to list the Bi-State DPS as a threatened species, which will automatically delay any decision we make regarding critical habitat for the Bi-State DPS. The comment period was reopened and our determination on the final listing action was delayed based on substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the proposed listing, making it necessary to solicit additional information. Thus, we announced that we will publish a listing determination on or before April 28, 2015.

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for the Bi-State DPS in this document. For more information on previous Federal actions concerning the Bi-State DPS, refer to the proposed listing rule (78 FR 64358) and the proposed designation of critical habitat (78 FR 64328) published in the **Federal Register** on October 28, 2013. For more information on the Bi-State DPS or its habitat, refer specifically to the proposed listing rule (78 FR 64358), which is available online at <http://www.regulations.gov> (at Docket No. FWS-R8-ES-2013-0072) or from the Nevada Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Critical Habitat

Section 3 of the Act defines critical habitat as the specific areas within the

geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, Federal agencies proposing actions affecting designated critical habitat must consult with us on the effects of their proposed actions under section 7(a)(2) of the Act to determine whether any activity they fund, authorize, or carry out will cause destruction or adverse modification of designated critical habitat.

New Information Regarding Proposed Critical Habitat

On October 28, 2013, we proposed as critical habitat for the Bi-State DPS four units consisting of approximately 755,960 hectares (ha) (1,868,017 acres (ac)) in Carson City, Lyon, Douglas, Mineral, and Esmeralda Counties, Nevada, and Alpine, Mono, and Inyo Counties, California (78 FR 64328). Approximately 75 percent (about 564,578 ha (1,395,103 ac)) of the area within the four units is currently suitable habitat.

Approximately 25 percent (about 191,381 ha (472,914 ac)) of the area within the four units is contiguous with currently suitable habitat (as outlined in our October 28, 2013, proposed rule), but based on the new information discussed below, is considered less than suitable for the DPS in its current condition.

During the first comment period that closed on February 10, 2014 (78 FR 77087), we received new information from the public and species experts on the species and habitat suitability (suitable versus unsuitable habitat for the Bi-State DPS). Specifically, there are scattered lands throughout the four units that harbor dense pinyon-juniper vegetation (dominated by *Pinus edulis* (pinyon pine) and various *Juniperus* (juniper) species) that are either historically woodland habitat (i.e., should not be converted or restored to sage-grouse habitat), or would not be considered suitable for restoration, and thus should not be considered a feature essential to the conservation of the DPS.

As we described in the *Criteria Used To Identify Critical Habitat* section of the proposed critical habitat rule, we focused on the best available vegetation data layers that would identify habitat suitability across the range of the Bi-State DPS (78 FR 64337–64339). To identify acres that are currently less than suitable (e.g., areas exhibiting less than optimal habitat conditions within the present range of the DPS that were either known or likely to be historically utilized), we examined information pertaining to potential woodland restoration sites identified in the 2012 Bi-State Action Plan (Bi-State TAC 2012, pp. 90–95). The new information provided during the first comment period improves our understanding of unsuitable habitat, such that once areas described above are removed from the proposed critical habitat boundaries, the remaining habitat will be either currently suitable for sage-grouse use, or could be suitable for occupation of sage-grouse if practical management was applied. As such, we intend to fully evaluate these data and update our assessment of areas that fit our criteria according to the new

information available.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider among other factors, the additional regulatory benefits that an area would receive through the analysis under section 7 of the Act addressing the destruction or adverse modification of critical habitat as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of identifying areas containing essential features that aid in the recovery of the listed species, and any ancillary benefits triggered by existing local, State, or Federal laws as a result of the critical habitat designation.

When considering the benefits of exclusion, we consider, among other things,

whether exclusion of a specific area is likely to incentivize or result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. In the case of the Bi-State DPS, the benefits of critical habitat include public awareness of the presence of sage-grouse and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the DPS due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken, authorized, funded or otherwise permitted by Federal agencies.

The final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis concerning the proposed critical habitat designation (DEA), which is available for review and comment (see **ADDRESSES**).

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We

then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (e.g., under the Federal listing as well as other Federal, State, and local regulations). The baseline, therefore, represents the costs of all efforts attributable to the listing of the species under the Act (i.e., conservation of the DPS and its habitat incurred regardless of whether critical habitat is designated). The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the Bi-State DPS. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the DPS. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct an optional section 4(b)(2) exclusion analysis.

For this particular designation, we developed an Incremental Effects Memorandum (IEM; Service 2014) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a DEA of the probable effects of the designation of critical habitat for the Bi-State DPS. We began by conducting an analysis of the proposed designation of critical habitat in order to focus on the key factors that are likely to result in incremental economic impacts. Where applicable, the analysis filtered out the geographic areas in which the critical habitat designation is unlikely to result in probable incremental economic impacts. In particular, the DEA considers baseline costs (i.e., absent critical habitat designation) and includes probable economic impacts where land and water use may be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the Bi-State DPS. The analysis examined costs that may result from projects forecast in areas of proposed critical habitat considered to be currently suitable and used by the DPS. In the remaining areas considered to be currently unsuitable and not currently used by the Bi-State DPS, the analysis examined the costs associated with implementation of conservation measures that are likely attributable solely to the proposed critical habitat designation. Ultimately, this analysis examines the economic costs of restricting or modifying specific land uses or other activities for the benefit of the DPS's habitat within the proposed critical habitat designation. This DEA is summarized in the narrative below.

Executive Orders 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the Executive Orders' regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable. We assess to the extent practicable, the probable impacts, if sufficient data are available, to both directly and indirectly impacted entities.

As part of our DEA, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the Bi-State DPS, first we identified probable incremental economic impacts associated with the following categories of activities: Livestock grazing; agriculture; residential and related development; mining activities; renewable energy development; linear infrastructure projects; recreation; wildfire; and nonnative, invasive plants. We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the Bi-State DPS is present, Federal agencies already will be required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the DPS, if the Bi-

State DPS is listed under the Act. If we finalize this proposed critical habitat designation and listing rule, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process that will also consider jeopardy to the listed DPS. Therefore, disproportionate impacts to any geographic area or sector are not likely as a result of this critical habitat designation.

In our IEM (Service 2014), we attempted to clarify the distinction between the effects that will result from the species being listed and those attributable to the critical habitat designation (i.e., difference between the jeopardy and adverse modification standards) for the Bi-State DPS's critical habitat. Because the designation of critical habitat for the Bi-State DPS was proposed concurrently with the listing, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species being listed and those which will result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical or biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would result in sufficient harm or harassment to constitute an adverse effect to the Bi-State DPS would also likely adversely affect the essential physical or biological features of critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this DPS. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this

proposed designation of critical habitat.

The proposed critical habitat designation for the Bi-State DPS includes approximately 755,960 hectares (ha) (1,868,017 acres (ac)) in four units, all of which are considered currently occupied. The four units span eight counties, including portions of Alpine, Inyo, and Mono Counties in California; and Carson City, Douglas, Esmeralda, Lyon, and Mineral Counties in Nevada. Some of the units we are proposing to designate as critical habitat contain corridors/sites that are currently unsuitable for use because of woodland encroachment. These corridors/sites are interspersed within suitable habitat that is currently used by the DPS. These sites provide essential connectivity corridors and habitat extent necessary for the conservation and recovery of the DPS (see the Physical or Biological Features section of the proposed critical habitat rule (78 FR 64328)). Once special management designed to improve the condition of these interspersed corridors/sites has been implemented, they will help ensure long-term conservation of the DPS and provide connectivity between currently fragmented areas. We are not proposing to designate specific areas outside the geographical area currently occupied by the DPS.

The four units we proposed as critical habitat on October 28, 2013 (78 FR 64328), correspond to the four populations of the Bi-State DPS recognized by the Western Association of Fish and Wildlife Agencies (WAFWA), which include: (1) Pine Nut, (2) North Mono Lake, (3) South Mono Lake, and (4) White Mountains. These units are

contained within the Population Management Unit (PMU) boundaries (which are identified on the maps in the **Proposed Regulation Promulgation** section of the proposed critical habitat rule); however, the proposed North Mono Lake Unit (Unit 2) combines three PMUs (Desert Creek–Fales, Bodie, and Mount Grant PMUs) into a single unit. Approximately 75 percent (about 564,511 ha (1,394,937 ac)) of the area within the four units is currently suitable habitat. Approximately 25 percent (about 191,329 ha (472,784 ac)) of the area within the four units is contiguous with currently suitable habitat but is considered less than suitable for current use. However, we expect to reduce these values based on the new information received during the first comment period (see **New Information Regarding Proposed Critical Habitat** section above). As a result, we expect that the Bi-State DPS economic analysis (IEc 2014) that is summarized below will be an overestimate of the probable incremental impacts resulting from a critical habitat designation.

Approximately 86 percent of the proposed critical habitat occurs on federally managed lands. However, because the majority of land in the eight affected counties is also federally managed (including greater than 80 percent in some of the affected counties), it is possible that changes to the management of and allowable uses on Federal lands could result in significant and material impacts on residents, businesses, and their overall economy, in part because some businesses rely on access to and resources on Federal lands (IEc 2014, pp. ES–2). Activities that may be associated with Federal lands within the proposed critical habitat designation include recreation and tourism, livestock

grazing, agriculture, mining, and renewable energy development.

Given that the presence of the Bi-State DPS is well known across the majority of areas proposed as critical habitat, this analysis anticipates that the majority (66 percent) of forecast incremental costs are administrative in nature (IEc 2014, pp. ES–6). These costs result from projects forecast in areas of proposed critical habitat considered to be currently suitable and used by the DPS. In these areas, any conservation measures recommended by the Service are expected to occur regardless of the designation of critical habitat in response to listing the DPS under the Act. Specifically, this analysis forecasts the total incremental costs of the proposed critical habitat designation to be less than \$8.8 million (present value over 20 years), assuming a seven percent discount rate (IEc 2014, pp. ES–6). Annualized incremental costs are forecast to be no greater than \$780,000 applying either a seven or three percent discount rate (IEc 2014, pp. ES–6).

We note that there are two scenarios presented in the DEA that reflect uncertainty in the potential for future changes specifically to livestock grazing, agriculture, and vegetation management. The low estimate assumes complete conifer encroachment on the portions of allotments overlapping unsuitable habitat; as a result, the only project modification costs estimated are for incremental vegetation management conducted by Federal land managers (IEc 2014, pp. ES–11). The high scenario assumes that all areas are grazed and estimates reductions to livestock stocking rates (measured in Animal Unit Months, or AUMs) on 24 active cattle allotments located in unsuitable habitat that are not

currently managed for the DPS (IEc 2014, pp. ES–9). The actual outcome likely falls somewhere between these two scenarios. Also, the actual outcome is in addition to the forecast increase in vegetation management expected to be conducted by Federal land managers following the designation of critical habitat. In both scenarios, the potential for voluntary conservation measures implemented by private farmers and ranchers with funding from the Natural Resources Conservation Service (NRCS) was also considered.

Of the total forecast incremental costs outlined in the DEA, we anticipate that approximately \$4.9 million are associated with the additional administrative effort required to consider adverse modification for future section 7 consultations occurring in areas considered currently suitable and used by the Bi-State DPS (IEc 2014, pp. ES–6). The largest share of these incremental administrative costs is associated with transportation and utility activities, which are predicted to occur in suitable habitat at a rate of approximately 25 projects per year (IEc 2014, pp. ES–6).

In the remaining proposed critical habitat areas considered to be currently unsuitable and not currently used by the Bi-State DPS (where conservation measures are likely attributable solely to the proposed critical habitat designation), the forecasted incremental costs are approximately \$4.0 million (IEc 2014, pp. ES–7). Of these costs, approximately 75 percent are due to Bi-State DPS conservation measures that may be recommended for grazing, transportation, residential development, and mining activities

in unsuitable habitat (IEc 2014, pp. ES–7). Conservation measures recommended for transportation activities comprise the largest share of these costs.

Proposed critical habitat Units 2 and 3 are anticipated to experience the greatest incremental costs if the Bi-State DPS proposal is finalized. These incremental costs account for approximately 46 percent and 34 percent of total incremental costs, respectively (IEc 2014, pp. ES–7).

The DEA provides activity-specific chapters that describe the potential incremental costs; each chapter includes a discussion of the key sources of uncertainty and major assumptions affecting the estimation of costs. These uncertainties vary depending on the specific activity in question. One issue that affects all activities is the question of whether conservation efforts undertaken in Bi-State DPS suitable habitat will occur regardless of whether critical habitat is designated in the future. In particular, the analysis assumes that the public is already aware of the need to consider the effects of future projects on the DPS in areas identified by the Service as suitable habitat and considered to be currently used by the DPS. It is possible that in some areas of suitable habitat, project proponents undertaking an assessment of the Bi-State DPS presence may determine that sage-grouse are not present. In such cases, this analysis may understate the incremental costs of the proposed rule. Conversely, an activity in a location identified as “unsuitable” could affect an adjacent “suitable” location where sage-grouse are present at the time. Therefore, there is also the possibility that some forecasts made for

“unsuitable” habitat have overestimated the incremental costs.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as all aspects of the proposed rule and our amended required determinations. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this DPS.

Required Determinations—Amended

In our October 28, 2013, proposed rule (78 FR 64328), we indicated that we would defer our determination of compliance with several statutes and executive orders until we had evaluated the probable effects on landowners and stakeholders and the resulting probable economic impacts of the designation. Following our evaluation of the probable incremental economic impacts resulting from the designation of critical habitat for the Bi-State DPS, we have amended or affirmed our determinations below.

Specifically, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211 (Energy, Supply, Distribution, and Use), the

Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Paperwork Reduction Act of

1995 (44 U.S.C. 3501 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951). However, based on our evaluation of the probable incremental economic impacts of the proposed designation of critical habitat for the Bi-State DPS, we are amending our required determinations concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and E.O. 12630 (Takings).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

The Service’s current understanding of the requirements under the RFA, as amended, and following recent court decisions, is that Federal agencies are required to evaluate the potential incremental impacts of rulemaking only on those entities directly regulated by the rulemaking itself, and therefore, not required to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried by

the Agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7 only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies will be directly regulated by this designation. There is no requirement under RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities are directly regulated by this rulemaking, the Service certifies that, if promulgated, the proposed critical habitat designation for the Bi-State DPS will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Executive Order 12630 (Takings)

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential

takings implications of designating critical habitat for the Bi-State DPS in a takings implications assessment. As discussed above, the designation of critical habitat affects only Federal actions. Although private parties that receive Federal funding, assistance, or require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. The economic analysis found that no significant economic impacts are likely to result from the designation of critical habitat for the Bi-State DPS. Because the Act's critical habitat protection requirements apply only to Federal agency actions, few conflicts between critical habitat and private property rights should result from this designation. Based on information contained in the economic analysis assessment and described within this document, it is not likely that economic impacts to a property owner would be of a sufficient magnitude to support a takings action. Therefore, the takings implications assessment concludes that this proposed designation of critical habitat for the Bi-State DPS does not pose significant takings implications for lands within or affected by the designation.

Authors

The primary authors of this document are the staff members of the Pacific Southwest Regional Office and the Nevada Fish and Wildlife Office, Region 8, U.S. Fish and Wildlife Service.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: May 19, 2014.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

Billing Code 4310-55-P

[FR Doc. 2014-12858 Filed 06/02/2014 at 8:45 am; Publication Date: 06/03/2014]